No. _____

In The

Supreme Court of the United States

October Term, 1992

TONY ALAMO,

Petitioner,

v.

ROBERT A. MILLER; KODY MILLER by ROBERT A. MILLER; ROBERT MILLER by ROBERT A. MILLER; CAREY MILLER; JEREMIAH JUSTIN MILLER, by CAREY MILLER; RICK MILLER; and JAMES MILLER,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Is an individual deprived of due process of law when a District Court and Court of Appeals deny him the opportunity under Federal Rule of Civil Procedure 60(b)(4) to contest as void for want of jurisdiction as to him the original ruling of the District Court and the decision of the Court of Appeals in an earlier appeal that he is the *alter ego* of certain corporations, where, although the corporations appeared in the District Court and then unsuccessfully appealed its finding of their supposed *alter-ego* status, the individual himself never appeared, appealed, or otherwise participated in the action until he filed his Rule 60(b)(4) motion long after the first appeal?

II. Is an individual deprived of due process of law when a District Court and Court of Appeals refuse to set aside under Federal Rule of Civil Procedure 60(b)(4) a default judgment the District Court entered against him under Federal Rule of Civil Procedure 55, notwithstanding that the Court of Appeals in an earlier appeal had held that the individual had in fact appeared in the original action in the District Court through his supposed *alter-ego* corporations? Or, in the alternative, is Federal Rule of Civil Procedure 55 repugnant as applied to the Due Process Clause of the Fifth Amendment to the Constitution of the United States, because it allowed the District Court to enter, and the Court of Appeals to affirm, a default judgment against the individual under those circumstances?

III. Is an individual deprived of due process of law when a District Court and Court of Appeals deny him the opportunity under Federal Rule of Civil Procedure

QUESTIONS PRESENTED FOR REVIEW – Continued

60(b)(4) to show that he had not been properly served with process by publication pursuant to Arkansas Rule of Civil Procedure 4(f), on the grounds that corporations supposedly his *alter egos* had appealed that issue earlier in the case and the Court of Appeals had decided it against them, and notwithstanding that the individual himself had neither appeared nor participated in either that appeal or the District Court proceedings leading up to it?

IV. Is Arkansas Rule of Civil Procedure 4(f) repugnant as applied to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, because it licenses service of process by publication on an individual even though the parties purporting to serve him thereby made no significant attempt to effect service by other, more effective means first?

V. May an individual's personal property, seized from him but not sold in the course of execution on a civil judgment, be retained by the judgment-creditor without any judicial scrutiny of the creditor's right to possession?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding in the United States Court of Appeals for the Eighth Circuit, the judgment of which is here for review, include:

1. petitioner Tony Alamo ("Alamo"), appellant in the Court of Appeals; and

2. respondents Robert A. Miller; Kody Miller, by Robert A. Miller; Robert Miller, by Robert A. Miller; Carey Miller; Jeremiah Justin Miller, by Carey Miller; Rick Miller; and James Miller ("the Millers"), appellees in the Court of Appeals.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS iii

TABLE OF CONTENTS v

TABLE OF AUTHORITIES vii

INTRODUCTION 1

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND RULES OF COURT INVOLVED 2

STATEMENT OF THE CASE 2

I Overview 2

II The original proceedings in the District Court 3

III The first appeal 8

IV The *post*-trial, *post*-appeal motions and the second appeal 10

ARGUMENT FOR ALLOWANCE OF THE WRIT ... 12

I With respect to Alamo's status as the *alter ego* of the Corporations, *Miller I* is void as to Alamo under *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969) 15

II Either *Miller I's* ruling that Alamo had appeared in the District Court through the *alter-ego* Corporations rendered the default judgment void; or Federal Rule of Civil Procedure 55 is unconstitutional as applied ... 19

TABLE OF CONTENTS

Page

III With respect to purported service of process on Alamo under Arkansas Rule of Civil Procedure 4(f), *Miller I* is void, because its statements on that issue are only *dicta*..... 23

IV If Arkansas Rule of Civil Procedure 4(f) sanctions service of process by publication under the facts of this case, it violates due process 25

V The lower courts' refusal to investigate the ownership of Alamo's personal and business records deprived him of due process..... 28

CONCLUSION 29

APPENDIX

Opinion in *Miller* v. *Tony Alamo*, No. 91-1447WA & No. 92-2205WA (8th Cir., 19 November 1992)..... 1a

Order in *Miller* v. *Tony and Susan Alamo Foundation*, Civil No. 88-2206 (W.D. Ark., 12 February 1992)..... 3a

Order in *Miller* v. *Tony and Susan Alamo Foundation*, Civil No. 88-2206 (W.D. Ark., 27 April 1992)..... 9a

Miller v. *Tony and Susan Alamo Foundation*, 924 F.2d 143 (8th Cir. 1991)..... 11a

Pertinent Texts of Constitutional Provisions and Rules of Court Involved..... 23a

TABLE OF AUTHORITIES

Page

CASES

Archawski v. Hanioti, 239 F.2d 806 (2d Cir. 1956) ... 20

Armstrong v. Manzo, 380 U.S. 545 (1965) 19

Bass v. Hoagland, 172 F.2d 205 (5th Cir. 1949) 19, 21

Bishop v. Committee on Professional Ethics and Conduct of the Iowa State Bar Association, 686 F.2d 1278 (8th Cir. 1982) 25

Brookhart v. Janis, 384 U.S. 1 (1966) 23

Carr Enterprises, Inc. v. United States, 698 F.2d 952 (8th Cir. 1983) 24

Chicago Life Insurance Co. v. Cherry, 244 U.S. 25 (1917) 13

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) 23

Davis v. Schimmel, 252 Ark. 1201, 482 S.W.2d 785 (1972) 26

DiCesare-Engler Productions, Inc. v. Mainman Ltd., 81 F.R.D. 703 (W.D. Pa. 1979) 27

Edmonson v. Farris, 263 Ark. 505, 565 S.W.2d 617 (1978) 24

Escoe v. Zerbst, 295 U.S. 490 (1935) 21

Galpin v. Page, 85 U.S. (18 Wall.) 350 (1874) 24, 26

Halliman v. Stiles, 250 Ark. 249, 464 S.W.2d 573 (1971) 26

Hazeltine Research, Inc. v. Zenith Radio Corp., 388 F.2d 25 (7th Cir. 1967) 18

Hovey v. Elliott, 167 U.S. 409 (1897) .. 2, 14, 20, 21, 22, 29

TABLE OF AUTHORITIES – Continued

Page

Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982) 18

Iron Arrow Honor Society v. Heckler, 464 U.S. 67 (1983) 25

Johnson v. Zerbst, 304 U.S. 458 (1938) 23

Meeks v. Stevens, 301 Ark. 464, 785 S.W.2d 18 (1990) 27

Mid-Continent Wood Products, Inc. v. Harris, 936 F.2d 297 (7th Cir. 1991) 28

Miller v. Tony and Susan Alamo Foundation, 924 F.2d 143 (8th Cir. 1991) ..... *passim*

Miller v. Tony and Susan Alamo Foundation, 748 F. Supp. 695 (W.D. Ark. 1990) 8

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 26

New York v. New York, N.H. & H.R.R., 344 U.S. 293 (1953) 26

Nikwei v. Ross School of Aviation, Inc., 822 F.2d 939 (10th Cir. 1987) 27

In re Noell, 93 F.2d 5 (8th Cir. 1937) 21

Parklane Hosiery Co., Inc. v. Shore, 439 F.2d 322 (1979) 18

Pennoyer v. Neff, 95 U.S. 714 (1878) 26

Recreational Properties, Inc. v. Southwest Mortgage Service Corp., 804 F.2d 311 (5th Cir. 1986) 27

Schroeder v. City of New York, 371 U.S. 208 (1962) 26

TABLE OF AUTHORITIES – Continued

Page

Sims v. Prescott Feed Mills, Inc., 286 Ark. 22, 688 S.W.2d 743 (1985) 24

Smith v. Edwards, 279 Ark. 79, 648 S.W.2d 482 (1983) 24, 27

Societe Internationale v. Rogers, 357 U.S. 197 (1958) 21

Tiedeman v. Chicago, M., St. P. & P.R.R. Co., 513 F.2d 1267 (8th Cir. 1975) 25

Tileston v. Ullman, 318 U.S. 44 (1943) 24

United States v. Sommers, 351 F.2d 354 (10th Cir. 1965) 17

Walden v. Craig's Heirs, 39 U.S. (14 Pet.) 147 (1841) 18

Warner v. Godfrey, 186 U.S. 365 (1902) 22

Webster v. Reid, 52 U.S. (11 How.) 437 (1851) 17

Wetmore v. Karrick, 205 U.S. 141 (1907) 18, 22

Winhoven v. United States, 201 F.2d 174 (9th Cir. 1952) 22

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) ..... *passim*

STATUTES AND COURT RULES

United States Code

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2072(a) 21

Arkansas Rule of Civil Procedure 4(f) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Federal Rules of Civil Procedure

Rule 4(j) 3

Rule 55 ..... 2, 19, 23

Rule 55(a) 8, 19, 21

Rule 60(b)(4) ..... *passim*

Rule 65 10

Rule 69 12

Rules of the Supreme Court of the United States

Rule 10.1(c) 13

Rule 13.1 2

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PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Pursuant to Part III of the Rules of this Court, Tony Alamo petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion the Court of Appeals issued in support of its judgment ("*Miller II*") is unreported, and appears in the Appendix hereto ("Pet. App.") at 1a. The orders of the United States District Court for the Western District of Arkansas of 12 February and 24 April 1992, which *Miller*

II affirmed, are unreported, and appear in Pet. App. at 3a and 9a, respectively. The earlier opinion of the Court of Appeals (*"Miller I"*) is reported at 924 F.2d 143 (8th Cir. 1991), and appears in Pet. App. at 11a.

JURISDICTION

The Court of Appeals entered its judgment and opinion in *Miller II* on 19 November 1992. This petition is therefore timely under this Court's Rule 13.1.

This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES OF COURT INVOLVED

This case involves application of the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States to Federal Rules of Civil Procedure ("FRCP") 55 and 60(b)(4), and to Arkansas Rule of Civil Procedure ("ARCP") 4(f), pertinent parts of which appear in Pet. App. at 23a.

STATEMENT OF THE CASE

I. Overview. The facts of this case frame five fundamentally important issues of due process:

- Notwithstanding *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*[1], may Alamo be held to be the *alter ego* of two corporations when they, *but not he*, appeared in the District Court and then unsuccessfully appealed the District Court's finding of *alter-ego* status?
- Notwithstanding *Hovey* v. *Elliott*[2], may Alamo have a *default* judgment entered against him when the District Court found that the corporations that did appear were his *alter egos*,

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[1] 395 U.S. 100 (1969).

[2] 167 U.S. 409 (1897).

and when on the corporations' appeal the Circuit Court not only affirmed that finding but also ruled that Alamo had in fact appeared in the District Court through them?

- Notwithstanding *Zenith Radio*, on an appeal by the supposedly *alter-ego* corporations may Alamo be held to have been properly served by publication, when he personally participated in neither the District Court proceedings that led to the finding of *alter-ego* status nor the appeal?
- May Alamo be served by publication when the Millers made no significant effort to attempt to serve him by more effective means first? And,
- May Alamo's personal property, seized but not sold in the course of execution of the judgment the Millers obtained, be retained by them without any judicial scrutiny of their right to possession?

II. The original proceedings in the District Court. On 12 October 1988 the Millers filed a complaint in the District Court against the Tony and Susan Alamo Foundation ("the Foundation"), the Music Square Church, and five individuals including Alamo.[3] On 16 November 1988 the Corporations answered, for themselves and purportedly on behalf of Alamo, denying liability and asking that the complaint "be denied, dismissed, and held for naught".[4] Disregarding this answer as an appearance by Alamo, on 14 February 1989 the Millers moved for a continuance, alleging that

- the Foundation "filed an Answer";

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[3] Alamo will refer to the entities collectively as "the Corporations".

[4] Appellant Tony Alamo's Appendix (Eighth Circuit Rule 30A(B)(3)) in *Miller* v. *Alamo*, No. 92-1447 WAFS (8th Cir.), at 31. This document will be cited hereinafter as "Alamo's Cir. Ct. App.".

- "[s]ervice copies of the Complaint on all other defendants were subsequently returned to [the Millers'] counsel and marked 'Return to Sender, Not at This Address' ";
- the Millers "have been unable to perfect service of process against * * * Alamo";
- the Millers "have served interrogatories upon [the Corporations] in an attempt to locate [Alamo]"; and
- "[u]pon receipt of the answers to [their] Interrogatories, [the Millers] shall secure the services of a private detective agency to locate and serve [Alamo]".[5]

The Millers made only this one attempt to serve Alamo at "P.O Box 398, Alma, Arkansas" between 12 October 1988 and 14 February 1989. On 16 February 1989 United States District Judge Morris S. Arnold allowed the Millers until 12 May 1989 to serve Alamo.[6] Later, however, in another case Judge Arnold testified that

- "good cause" for an extension of time under FRCP 4(j) must be established "through testimony or sworn affidavit";

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[5] *Id.* at 35. The Millers filed this motion because FRCP 4(j) would otherwise have required dismissal of the action as to Alamo. Although the motion was silent as to the date of attempted service on Alamo, on 21 June 1989 one of the Millers' attorneys stated in an affidavit that

> [o]n or about October 24, 1988, service of process was attempted on all named defendants * * * at the following last known address: P.O. Box 398, Alma, Arkansas, 72921. Service copies of all of the Complaints, except that directed to the Foundation, were returned * * * marked "Return to Sender, Not at This Address."

Alamo's Cir. Ct. App. at 68.

[6] Miller v. Tony and Susan Alamo Fd'n, No. 88-2206 (W.D. Ark.), Docket No. 5, *in* Alamo's Cir. Ct. App. at 4.

- the Millers attached "[n]o affidavit" and "nothing under penalty of perjury" to their motion;
- the motion did not allege that Alamo was evading service;
- the motion "doesn't say" what the Millers did to perfect service other than the one mailing to Alma, Arkansas; and
- the Millers' statement that "they have been unable to perfect service of process" was just a bald assertion.[7]

Dissatisfied with the Corporations' answers to interrogatories, on 2 May 1989 the Millers moved for and were granted an additional 60 days to serve Alamo.[8]

Overlapping these events, on 27 March 1989 the District Court allowed the Foundation to "strik[e] the incorrect reference to Tony Alamo individually in [its] previously filed Answer".[9] The Corporations then answered separately, denying all liability. This clarified that the Corporations' counsel did not represent Alamo.[10]

On 21 June 1989 B.E. Holmes, one of the Millers' attorneys, filed an affidavit in support of service under ARCP 4(f), stating that

- sometime after 23 May 1989, the Millers' counsel "received a copy of a pamphlet distributed by the Holy Alamo Christian Church and Seminary which mentioned the instant suit in a message from * * * Alamo" and listed "[t]he address of the * * * Church * * * as 13136 Sierra Highway, Canyon Country, California 91350";

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[7] Alamo's Cir. Ct. App. at 140-145.

[8] *Id.* at 60, 64. The Foundation had answered that Alamo was living in "some hotel in Los Angeles", California. *Id.* at 54. This corroborated other information the Millers already had. *See post*, note 13 & accompanying text.

[9] Alamo's Cir. Ct. App. at 59.

[10] As *Miller I* recognized, 924 F.2d at 147: "Appellants' [*i.e.*, the Corporations'] attorney does not represent Alamo."

- on 6 June 1989 the Millers mailed the complaint, summons, and returns of service to Alamo at that address – but "[t]he Complaint was returned to [Holmes] on June 19, 1989, marked 'Return to Sender. Not presently at this address' ";
- "[d]espite diligent inquiry, [Holmes] has been unable to date to obtain information concerning the whereabouts of the individual defendants" – but Holmes described no "diligent inquiry" other than receipt of the pamphlet and mailing to the "Sierra Highway" address; and
- "the defendants are evading service of process" – but Holmes described no "evas[ion]", explicitly conceding instead that, "[d]espite indications that Mr. Alamo is operating out of the Holy Alamo Church in California, a return of 'not presently at this address' has been made. Use of the word 'presently' implies that Mr. Alamo has recently been there or will be returning there, and that his whereabouts are known to one or more individuals at the Holy Alamo Church".[11]

In fact, the Millers knew much earlier that the Holy Alamo Church was located in Saugus, California,[12] because (among other things) the allegedly tortious conduct that underlay their complaint took place there in January of 1988.[13]

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[11] Alamo's Cir. Ct. App. at 70-71.

[12] In the mid-1980s, Canyon Country changed its name to Saugus.

[13] *See* Complaint ¶ 31. *See also, e.g.*, Transcript of the Trial of 27-28 November 1989, *Miller* v. *Tony and Susan Alamo Fd'n*, No. 88-2206 (W.D. Ark.), Vol. 1, at 25; Vol. 2, at 97-98, 114-15; Vol. 3, at 13. For a key example, Carey Miller described how, in January of 1988, he had hired a private detective who located his son at the church property. Transcript, Vol. 2, at 97-98.

On 9 August 1989 Holmes filed an affidavit of service, stating that

> • "[a] Warning Order [under ARCP 4(f)] was published in [a local Arkansas newspaper] on June 29, 1989 and July 6, 1989"; and
>
> • "[a]lso, in accordance with [ARCP 4(f)], the Warning Order, together with a copy of the Complaint and Summons * * * , were served upon each of the individual defendants at their last known address by U.S. Mail restricted delivery, on June 26, 1989. Attempts for service were made for each of these packages on June 28, 1989 and July 7, 1989, but the envelopes were 'unclaimed,' and were ultimately returned to [Holmes] on July 14, 1989".[14]

Holmes attached a letter of 6 June 1989 from her to the Postmaster of the Alma Arkansas Branch, seeking "any more recent addresses [than P.O. Box 398, Alma, Arkansas 72921]" for four individual defendants, *but not including Alamo*. The Postmaster replied that "[w]e are unable to provide up-dated addresses for these individuals".[15] Holmes attached nothing that sought a "more recent address" *for Alamo* from the Postmaster either in Alma *or in Saugus*. Holmes also attached a copy of the envelope and postal return-receipt addressed (but not delivered) to Alamo at "P.O. Box 398, Alma, Arkansas 72921", and marked "Unclaimed" and "postage due $2.00".[16] But the Millers sent nothing to Alamo at the Saugus address, respecting which Holmes had earlier stated that "[u]se of the word 'presently' implies that Mr. Alamo has recently been there or will be returning there".

On 9 August 1989 the Millers sought entry of, and on 17 August 1989 the Court Clerk entered, default against Alamo for "hav[ing] failed to plead or otherwise

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[14] Alamo's Cir. Ct. App. at 91.

[15] *Id.* at 101-02.

[16] *Id.* at 108.

defend".[17] On 27 and 28 November 1989 the District Court held a default hearing on the issue of damages against Alamo. Neither the Corporations nor Alamo participated.[18]

On 5 and 6 March 1990 the District Court held a hearing on whether the Corporations were Alamo's *alter egos*. Alamo did not participate.[19] On 19 April 1990 the court found the Corporations to be Alamo's *alter egos*, set aside their corporate forms, dismissed them as parties to the case, and ruled that any judgment thereafter entered against Alamo would also lie against them.[20] And on 27 April 1990 the court entered a huge money judgment (later amended) against Alamo,[21] which resulted in the seizure of real and personal property. The court did not consider whether, having held the Corporations to be Alamo's *alter egos*, and the Corporations having denied all liability in the answers they filed prior to 9 August 1989, the entries of a *default* and a *default* judgment against Alamo were improper.[22]

III. The first appeal. The Corporations appealed, raising two issues relevant here: namely, that the District Court (i) lacked *in personam* jurisdiction over Alamo, and

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[17] *Id.* at 110, 111.

[18] *See* Transcript of the Trial of 27-28 November 1989, *Miller* v. *Tony and Susan Alamo Fd'n*, No. 88-2206 (W.D. Ark.), cover sheet (showing appearance by the Millers' counsel only); Transcript of the Trial of 6-7 March 1990, No. 88-2206 (W.D. Ark.), Vol. 1, at 44-45 (showing the Corporations not parties to the default hearing).

[19] *See* Transcript of the Trial of 6-7 March 1990, *Miller* v. *Tony and Susan Alamo Fd'n*, No. 88-2206 (W.D. Ark.), Vol. 1, at 3.

[20] *See* Miller I, 924 F.2d at 145-46.

[21] *See* Miller v. Tony and Susan Alamo Fd'n, 748 F. Supp. 695 (W.D. Ark. 1990).

[22] FRCP 55(a) permits entry of default only "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend".

(ii) erred in finding the Corporations his *alter egos*. Alamo did not appeal. "No action [was] taken regarding the default, and no appeal [was] perfected therefrom"; "[n]o appeal [was] perfected from th[e personal] judgment [against Alamo]"; and the Corporations' "attorney d[id] not represent Alamo".[23]

The Circuit Court decided the appeal on 23 January 1991. As to personal jurisdiction, the court "noted in passing" that

> service on Alamo, a fugitive from justice whose whereabouts are unknown, was strictly in accordance with [ARCP] 4(f). The rule reads:
>
> > Where it appears by the affidavit of a party or his attorney that, after diligent inquiry, the identity or whereabouts of a defendant remains unknown, service shall be by warning order * * * .
> >
> > The affidavit required by this Rule, which recites in great detail the difficulty in locating Alamo and efforts to serve him, was duly filed. * * * The warning order was * * * duly published.[24]

The court adverted to no supposed "facts" other than "[t]he affidavit required by [ARCP 4(f)]" to show how the Millers had engaged in "diligent inquiry".

And on the *alter-ego* issue, the court said simply that the Corporations

> have appeared in this litigation. These entities were found to be alter egos of Tony Alamo. Thus, the entry of appearance by these entities

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[23] Miller I, 924 F.2d at 145, 147. *See* Alamo's Cir. Ct. App. at 112 (notice of appeal in *Miller I*).

[24] 924 F.2d at 147 (emphasis supplied). The phrase "noted in passing" is peculiarly apt, because the passage addressing ARCP 4(f) is clearly *dicta* in light of the court's subsequent treatment of the *alter-ego* question.

> constituted an entry of appearance by Tony Alamo.[25]

The court did not, however, resolve the inconsistency between its statements that "none of the individuals filed an answer" and "the entry of appearance by [the Corporations] constituted an entry of appearance by Tony Alamo".[26] Neither did the court explain how a *default* judgment against Alamo was proper when "the entry of appearance by [the Corporations] constituted an entry of appearance by [him]" prior to the alleged default.

IV. The *post*-trial, *post*-appeal motions and the second appeal. On 21 October and 12 November 1991, respectively, Alamo moved the District Court under FRCP 60(b)(4) and 65 to set aside the default judgment as void for want of *in personam* jurisdiction, and for a preliminary injunction with respect to execution of the judgment the Millers had obtained.[27] Alamo also requested a hearing, offering to prove that:

> • from filing of the complaint on 12 October 1988 through the Clerk's entry of default against Alamo on 9 August 1988, the Millers had made only one unsuccessful mailing each to Alma, Arkansas, and Saugus, California;[28]

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[25] 924 F.2d at 148.

[26] *Id.* at 145, 148. The Corporations filed answers denying all liability. *Ante*, page 5. If these answers were "appearances" for Alamo perforce of the Corporations' *alter-ego* status, then *ex necessitate* Alamo filed an answer, too.

[27] Alamo's Cir. Ct. App. at 117, 179. The motion for preliminary injunction relied on the motion to set aside, as "[s]aid motion propounds * * * grounds requiring the setting aside of the default entered against Alamo and the return of all property seized pursuant to said default judgment". *Id.* at 185.

[28] 24 October 1988 (sent back marked "Not at This Address Return to Sender") and 6 June 1989 (sent back marked "Return to Sender Not presently at this Address"), respectively.

- the Millers had not requested the Postmasters in Alma or Saugus to provide forwarding addresses for Alamo;[29]
- the Millers had retained no private investigator or process server, or taken other action, to locate Alamo in Arkansas, California, or anywhere else;[30]
- for years, the Millers had known about the church in Saugus, and were admittedly aware on 19 June 1989 of "indications that Mr. Alamo is operating out of" that facility and "has recently been there or will be returning there";[31]
- from at least 26 October 1988 to late April 1989, Alamo was regularly and openly at the church in Saugus;[32]
- on 3 April 1989, Alamo was personally served with process in a pending California civil case at 13136 Sierra Highway, Saugus, California, which address the process server described as Alamo's "Home";[33] and
- based on a check of official records in California, Alamo had no reason to believe he was a "fugitive from justice" when he left that State for Las Vegas, Nevada, in late April, 1989.[34]

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[29] As they had done for other individual defendants. *See ante*, page 7.

[30] As they had promised to do in their motion for a continuance of 14 February 1989. *See ante*, page 4.

[31] *See ante*, page 6 & note 13.

[32] Alamo's Cir. Ct. App. at 155-78, 207-20.

[33] *Id.* at 148-53, 204-06.

[34] *Id.* at 154, 204-12. In opposition to Alamo's motion, the Millers conceded that their case "d[id] not rest on any allegation that Mr. Alamo was actually aware that the authorities were looking for him from October, 1988 through July, 1989". *Id.* at 222. They also admitted that, "[w]hile evidence that investigators for Los Angeles County could not locate Mr. Alamo

On 11 February 1992 the District Court denied both of Alamo's motions,

> conclud[ing] that neither an evidentiary hearing nor further argument is required. * * * [T]he Eighth Circuit in [*Miller I*] has already decided that the district court had personal jurisdiction over Alamo pursuant to Arkansas Civil Procedure Rule 4(f) and that, in any case, the entry of appearance of the corporate entities, which have been found to be alter egos of Alamo, constituted an entry of appearance by Alamo.[35]

On 18 February 1992 Alamo moved the District Court under FRCP 69 for a determination of who owned certain of Alamo's and the Corporations' personal and business records of which the Millers were in possession as a result of the execution of the judgment against Alamo. Alamo contended that these records were rightfully his and not the Millers', and that he needed the records to defend himself in other on-going civil and criminal litigation. The District Court denied the motion because Alamo "failed to cite any legal authority for his request".[36]

On a consolidated appeal, the Circuit Court affirmed, saying only that "[t]he district court's rulings are clearly correct".[37]

This petition followed.

ARGUMENT FOR ALLOWANCE OF THE WRIT

Miller II's affirmance of the District Court's denial of Alamo's FRCP 60(b)(4) motion on the authority of *Miller I* deprived Alamo of due process of law, because *Miller I* is

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between October, 1988 and April, 1989 would tend to show that Mr. Alamo was not so easy to find as he now lets on, *the current record does not show that to be a fact*". *Id.* at 223 (emphasis supplied; footnote omitted).

[35] Pet. App. at 6a.

[36] *Id.* at 10a.

[37] *Id.* at 2a.

inapplicable or void as to him. *Miller I* can bind only parties to that appeal and their privies, and only as to matters adjudicated therein.[38] But Alamo did not personally appeal or appear in *Miller I*.[39] And the Corporations did not appeal the default judgment.[40] Thus, properly to address Alamo's FRCP 60(b)(4) motion, the District Court and the Court of Appeals needed to decide, *but instead avoided even investigating*, whether he was privy to *Miller I* at all, and (if so) how its rulings affected him. That inquiry would have exposed *Miller I* as a four-headed judicial Frankenstein's monster "that conflicts with applicable decisions of this Court"[41] and offends the first principles of due process.

First, *Miller I's* affirmance of the District Court's finding that the Corporations were Alamo's *alter egos*[42] cannot bind Alamo. For under *Zenith Radio* that finding – without service on or appearance by him – binds only them.[43] Thus, *Miller I's* extrapolation of the District Court's *alter-ego* finding to Alamo is necessarily *void* as to him.

Second, as a product of the *alter-ego* theory, *Miller I's* ruling that "the entry of appearance by the [Corporations] constituted an entry of appearance by Tony Alamo"[44] also constitutes a *void* judgment under *Zenith Radio*. Even worse, were this ruling correct its effect would be to sanction a logically and legally impossible

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[38] "[A] court cannot conclude all persons interested by its mere assertion of its own power." Chicago Life Ins. Co. v. Cherry, 244 U.S. 25, 29 (1917).

[39] *See* Miller I, 924 F.2d at 146, 147.

[40] *Id.* at 145, 147.

[41] Rule 10.1(c) of the Rules of the Supreme Court of the United States.

[42] 924 F.2d at 148.

[43] Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969).

[44] 924 F.2d at 148.

"*non*-default default judgment" against Alamo, which must be *void* for want of jurisdiction under *Hovey*[45].

Third, Miller I stated that Alamo was served under ARCP 4(f).[46] If the Corporations had standing, *independent* of their *alter-ego* status, to contest the issue, this statement is a holding, but binds only them.[47] If, conversely, they had standing only *because of* that supposed status, *Miller I's* ruling that "the entry of appearance by the [Corporations] constituted an entry of appearance by Tony Alamo"[48] rendered its "ruling" on the ARCP 4(f) issue moot and mere *dicta*. Moreover, even if not moot or *dicta*, under *Zenith Radio* this "ruling" could bind only the Corporations; and its extrapolation to Alamo is *void*.

And fourth, Miller I claimed that the Millers were entitled to employ ARCP 4(f) to serve Alamo by publication, because they had had "difficulty in locating [him] and efforts to serve him".[49] In fact, the Millers' "efforts" were so insubstantial as to render their (mis)use of ARCP 4(f) a violation of due process, and any judgment based on such service *void* for want of jurisdiction.

Moreover, *Miller II's* affirmance of the District Court's refusal even to investigate the ownership of Alamo's records palpably deprived him of due process.

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[45] Hovey v. Elliott, 167 U.S. 409 (1897).

[46] 924 F.2d at 147-48.

[47] If Alamo was not a party or in privity with a party to the first appeal, he cannot be bound by *Miller I's* judgment against the Corporations simply because both he and they (according to the supposition in the text) had standing to raise the ARCP 4(f) issue.

[48] 924 F.2d at 148.

[49] *Id.* at 147.

I. With respect to Alamo's status as the *alter ego* of the Corporations, *Miller I* is void as to Alamo under *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969).

The *alter-ego* issues presented here are important and recurring ones that demand this Court's attention, not only for Alamo's sake but also to provide guidance in other litigation. *Zenith Radio* remains the controlling precedent.[50] There, HRI (a subsidiary of non-party Hazeltine) sued Zenith. HRI and Zenith stipulated that HRI and Hazeltine were "one and the same company", thereby "eliminat[ing] the necessity for Zenith to * * * pierc[e] the corporate veil". Zenith then counterclaimed against HRI, but neither named Hazeltine as a party nor served it with the counterclaim. When Zenith sought a judgment against Hazeltine, the latter filed a "special appearance". Based on the stipulation and its own finding that Hazeltine and HRI "would be considered as one entity", the trial court entered judgment against both HRI and Hazeltine, "thereby rejecting Hazeltine's objection that the court was without jurisdiction over it".

Concluding that the judgment against Hazeltine must be vacated, this Court explained

> that one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process. * * * The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant. * * *
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> Here, Hazeltine was not named as a party, was never served and did not formally appear

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[50] Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 108-11 (1969). All quotations in the following section of the petition are from these pages in *Zenith Radio*.

> at the trial. Nor was the stipulation an adequate substitute for the normal means of obtaining jurisdiction over a person or a corporation. * * *
>
> Perhaps Zenith could have proved and the trial court might have found that HRI and Hazeltine were *alter egos; **but absent jurisdiction over Hazeltine, that determination would bind only HRI.*** If the *alter ego* issue had been litigated, and if the trial court had decided that HRI and Hazeltine were one and the same entity ***and that jurisdiction over HRI gave the court jurisdiction over Hazeltine, perhaps Hazeltine's appearance before judgment with full opportunity to contest jurisdiction would warrant entry of judgment against it.*** But that is not what occurred here. The trial court's judgment against Hazeltine was based wholly on HRI's stipulation. HRI may have executed the stipulation to avoid litigating the *alter ego* issue, ***but this fact cannot foreclose Hazeltine, which has never had its day in court on the question of whether it and its subsidiary should be considered the same entity for purposes of this litigation.***[51]

Here, Alamo did not personally participate in the original District Court proceedings or the first appeal (unlike Hazeltine, which filed a special appearance, and then appealed). Alamo was named as a defendant – but this could not confer *in personam* jurisdiction on the District Court, absent his voluntary appearance or valid service of process. And Alamo was not properly served under ARCP 4(f).[52] So, he is in a position at least as strong as Hazeltine's.

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[51] ***Bold-face emphasis*** supplied; footnotes omitted.

[52] Alamo did not appear in the District Court to challenge purported ARCP 4(f) service, and therefore is not bound by any (non-existent) jurisdictional ruling of that court that he failed to appeal. Furthermore, the statements in *Miller I* on the ARCP 4(f) issue are only *dicta*. Thus, the question of improper service remained open for determination on Alamo's FRCP 60(b)(4)

Here, the District Court decided the *alter-ego* issue after a trial between the Corporations and the Millers, but without Alamo's participation.[53] Under *Zenith Radio*, "absent jurisdiction over [Alamo], that determination would bind only [the Corporations]". Furthermore, if, after litigating the *alter-ego* issue, the District Court "had decided that [the Corporations] and [Alamo] were one and the same entity and that jurisdiction over [the Corporations] gave the court jurisdiction over [Alamo], perhaps [Alamo's] appearance before judgment with full opportunity to contest jurisdiction would [have] warrant[ed] entry of judgment against [him]. But that is not what occurred". To the contrary:

- The District Court never considered, let alone decided, "that jurisdiction over [the Corporations] gave the court jurisdiction over [Alamo]", because it erroneously assumed Alamo had been served under ARCP 4(f). And,

- Alamo did not "appear[] before judgment with full opportunity to contest jurisdiction [predicated on the theory of *alter egos*]", because neither the Millers nor the District Court advanced that theory during the proceedings; and neither Alamo nor the Corporations could reasonably have predicted that *Miller I* would suddenly seize upon it on appeal. Rather, as was his right, Alamo withheld his appearance in reliance on the insufficiency of service under ARCP 4(f), the *only* jurisdictional predicate of which he, the Millers, and the District Court were aware.[54]

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motion; and therefore the impropriety of service may be assumed *arguendo* for the purposes of this part of the argument.

[53] In *Zenith Radio*, Zenith and HRI stipulated to that issue. But this is a distinction without a difference, as stipulations "are to be considered facts on the trial, without further evidence". United States v. Sommers, 351 F.2d 354, 357 (10th Cir. 1965).

[54] "No person is required to answer in a suit on whom process has not been served." Webster v. Reid, 52 U.S. (11 How.)

In *Zenith Radio*, although Hazeltine appeared and the trial court "reject[ed] Hazeltine's objection that [it] was without jurisdiction over [Hazeltine], Hazeltine was *not* "foreclose[d]" on the question of *in personam* jurisdiction, because it "ha[d] never had *its* day in court on the question of whether it and its subsidiary should be considered the same entity for [jurisdictional] purposes".[55] Here, where Alamo *never* appeared, where the District Court *never* addressed the issue of jurisdiction premised upon *alter-ego* status, and where the issue arose only on an appeal in which Alamo did *not* participate (again, as was his right were ARCP 4(f) service defective), Alamo has unquestionably *not* "ha[d] *his* day in court" – and for the District Court on Alamo's FRCP 60(b)(4) motion and the Court of Appeals in *Miller II* to hold otherwise deprived him of due process of law.[56]

437, 459-60 (1851). Absent service, "[a] defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds". Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 706 (1982). And "a judgment rendered *in personam* against a defendant without jurisdiction of his person is * * * void", and "a nullity". Wetmore v. Karrick, 205 U.S. 141, 149 (1907); Walden v. Craig's Heirs, 39 U.S. (14 Pet.) 147, 154 (1841).

[55] *Zenith Radio* denied that Hazeltine could be deemed to have "ha[d] *its* day in court" simply because *HRI* stipulated that Hazeltine was its *alter ego*, or because (*absent* Hazeltine as a party) "Zenith could have proved and the trial court might have found that HRI and Hazeltine were *alter egos*". "[A]bsent jurisdiction over Hazeltine", this Court held, "that determination would bind *only HRI*". *See also* Hazeltine Research, Inc. v. Zenith Radio Corp., 388 F.2d 25, 30 (7th Cir. 1967).

[56] *E.g.*, Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 327 n.7 (1979)("violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard").

II. Either *Miller I's* ruling that Alamo had appeared in the District Court through the *alter-ego* Corporations rendered the default judgment void; or Federal Rule of Civil Procedure 55 is unconstitutional as applied.

Besides running afoul of *Zenith Radio*, *Miller I's* theory of Alamo's vicarious representation by the *alter-ego* Corporations crashes head-on, with logical and legal fatality, into the core principle of due process: the right to notice and hearing "at a meaningful time and in a meaningful manner".[57]

Under *Miller I's* vicarious-representation theory, "the entry of appearance by th[e Corporations in the District Court] constituted an entry of appearance by Tony Alamo".[58] But this entry, *denying all liability*, occurred *months before* the Millers sought Alamo's default.[59] During that time, the Corporations (and, under *Miller I's* theory, *Alamo* too) neither had "failed to plead or otherwise defend",[60] nor were subject to any sanctions on the issue of liability,[61] and therefore were not conceivably in default, even had they failed to appear at a hearing on that issue.[62] But the District Court held no such hearing –

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[57] Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

[58] 924 F.2d at 148.

[59] *See* Miller v. Tony and Susan Alamo Fd'n, No. 88-2206 (W.D. Ark.), Docket Nos. 3, 8, 10, *in* Alamo's Cir. Ct. App. at 4.

[60] Fed. R. Civ. P. 55(a).

[61] Later, the Millers unsuccessfully sought a default against the Corporations, but did obtain sanctions excluding the latters' witnesses from the hearing on the *alter-ego* issue. Miller v. Tony and Susan Alamo Fd'n, No. 88-2206 (W.D. Ark.), Docket Nos. 63, 65, 103, *in* Alamo's Cir. Ct. App. at 5, 7.

[62] *E.g.*, Bass v. Hoagland, 172 F.2d 205, 210 (5th Cir. 1949) (FRCP 55(a) "does not require that to escape default the defendant must not only file a sufficient answer to the merits, but must also * * * be present in court when the case is called for a

instead, *it **excluded** the Corporations from the later default hearing on damages; and, after finding the Corporations to be Alamo's* alter egos, *let stand the earlier **default** against him.*

In *Hovey* v. *Elliott*,[63] this Court asked

> whether a court * * * has the right to summon a defendant to answer, and then after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing * * * . The mere statement of this proposition would seem, in reason and conscience, to render imperative a negative answer. The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.

The Court then asked

> whether a judgment based upon the exercise of such an assumed power is void for want of

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trial. * * * When [the defendant] by his attorney filed a denial of the plaintiff's case neither the clerk nor the judge could enter a default against him"). Archawski v. Hanioti, 239 F.2d 806, 807 (2d Cir. 1956) (party's "failure to appear [at trial] * * * was not properly speaking a default and did not admit all the * * * allegations of the libel. His answer had put all these allegations in issue and [other parties] were accordingly put to their proof").

[63] 167 U.S. 409, 413-14, 444-45, 446 (1897). *Hovey* involved entry of a decree that a bill be taken *pro confesso*, as punishment for an alleged contempt of court. *Id.* at 411-12. Here, the default entered against Alamo involved *no* purported sanction; so the relief he requests follows *a fortiori* from *Hovey*.

> jurisdiction * * * . It cannot be doubted that where a judgment is rendered without the issuance and service of summons against a party who did not enter an appearance, the court rendering it is without jurisdiction to do so, and it can be assailed as void * * * [T]he judgment [*sub judice*] was substantially one without a hearing, for of what efficacy or avail was the summons to appear when the court which issued the summons rendered its judgment upon the theory that the summons was inefficacious, and that the defendant had no right either to appear or be heard in his defense?
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> * * *
>
> There is no distinction in principle between determining a cause upon issues not raised by the pleadings in the actual absence of the party, and rendering a decree by refusing to permit a defendant to be heard in his defense or to consider the merits of a sufficient defense, and, indeed, by striking the pleading containing such defense from the files.

Mutatis mutandis, this reasoning applies in both principle and practice to entry of a default without a hearing where (according to *Miller I's* theory) Alamo actually appeared.[64]

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[64] *In principle: Compare* FRCP 55(a) *with* Societe Internationale v. Rogers, 357 U.S. 197, 209 (1958)(*Hovey* "establish[es] that there are constitutional limitations upon the power of courts * * * to dismiss an action without affording a party the opportunity for a hearing on the merits"), *and with* 28 U.S.C. § 2072(a) ("rules shall not abridge * * * any substantive right"). *In practice:* Bass v. Hoagland, 172 F.2d 205, 209-11 (5th Cir. 1949) (entry of default where party not in default violates due process, and judgment set aside, following *Hovey*). *See also* Escoe v. Zerbst, 295 U.S. 490, 494 (1935)("[w]hen an opportunity to be heard is denied altogether, the ensuing mandate of the court is void"); *In re* Noell, 93 F.2d 5, 6 (8th Cir. 1937)(" 'sentence of a

Thus, when *Miller I* suddenly seized on the theory of vicarious representation, it impliedly condemned the default judgment against Alamo as void *ab initio*. Yet, *sub silentio*, *Miller I* allowed that judgment to stand – in effect, creating a new, unheard-of, and self-contradictory "***non*-default default judgment**"! This result, however, plainly deprived Alamo of due process of law.[65]

To argue that, by not appealing the default judgment,[66] Alamo, the Corporations, or both "waived" any right to object to *ex post* appellate invention of this "*non*-default default judgment" is doubly wrong: *First*, if (as *Zenith Radio* teaches) *Miller I* erred in treating the Corporations' appearances as appearances by Alamo, then Alamo "waived" nothing, because (as shown *ante*) he was not a party to the appeal, was not required to appeal, was entitled to attack the default judgment as void under FRCP 60(b)(4) at any time notwithstanding the *dicta* in *Miller I* on the ARCP 4(f) issue, and was not bound by *Miller I's* erroneous application of the *alter-ego* theory to the Corporations. *Second*, even if *Miller I* correctly held that Alamo appeared in the District Court through the Corporations, nevertheless –

- Neither that court, nor the Millers, nor the Corporations and Alamo had any inkling during the original District Court proceedings that *Miller I* would invoke a

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court pronounced against a party without * * * giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal' ", following *Hovey*); Winhoven v. United States, 201 F.2d 174, 174-75 (9th Cir. 1952) (judgment entered without right to hearing denies due process and is void).

[65] *Cf.* Wetmore v. Karrick, 205 U.S. 141, 160 (1907)(entry of new judgment against party without opportunity to be heard violates due process); Warner v. Godfrey, 186 U.S. 365, 377 (1902)(allowing amendment of bill to assert new basis for relief, but precluding defendants from interposing defense, violates due process).

[66] *See* 924 F.2d at 147.

theory of vicarious representation "out of the blue" on appeal.[67]

- Alamo proceeded on the good-faith beliefs that service under ARCP 4(f) was ineffective, that the presence of his supposed *alter-ego* Corporations did not give the District Court *in personam* jurisdiction over him (*Zenith Radio*), and that he did not need to appeal but instead could challenge the default judgment under FRCP 60(b)(4) later on. And,
- Alamo lacked *pre*-appeal notice that he might be held to have appeared through the Corporations, and therefore had no meaningful opportunity to consider whether to appeal the default judgment.

These facts show anything but a "waiver" of due-process rights.[68]

In the alternative, if Federal Rule of Civil Procedure 55 sanctions *Miller I*'s "*non*-default default judgment", then that rule is unconstitutional as applied.

III. With respect to purported service of process on Alamo under Arkansas Rule of Civil Procedure 4(f), *Miller I* is void, because its statements on that issue are only *dicta*.

The lower courts were on no firmer ground to rely on *Miller I* with respect to service of process on Alamo under

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[67] Indeed, a theory of vicarious representation was totally inconsistent with the course of action followed: *viz.*, the Millers sought to serve Alamo personally under ARCP 4(f); the Corporations answered, but default was entered against Alamo anyway; and the Corporations were precluded from participating in the default hearing on damages.

[68] To overcome the strong presumption against the waiver of constitutional rights, it must be "clearly established" with "circumstances * * * clear and compelling" that there has been "an intentional relinquishment or abandonment of a known right or privilege". Brookhart v. Janis, 384 U.S. 1, 4 (1966); Curtis Publishing Co. v. Butts, 388 U.S. 130, 145 (1967); Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

ARCP 4(f). For *Miller I's* language on this issue is only *dicta*.

Alamo did not appeal in *Miller I*. If the Corporations did not vicariously represent him under an *alter-ego* theory of *in personam* jurisdiction (as Alamo has shown *ante*), then they lacked standing to appeal the question of personal service on him under ARCP 4(f); and the Circuit Court therefore lacked jurisdiction to opine on the matter.[69] Conversely, if the Corporations did vicariously represent Alamo, then (as *Miller I* itself said) "the entry of appearance by these entities [in the District Court] constituted an entry of appearance [there] by Tony Alamo" months before the Millers applied for an ARCP 4(f) "warning order".[70] Inasmuch as that rule allows service *only* when the "whereabouts of a defendant remains *unknown*",[71] substituted service on Alamo was never necessary or proper (he being present in court through the *alter-ego* Corporations under the assumption of vicarious

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[69] *See, e.g.*, Carr Enterprises, Inc. v. United States, 698 F.2d 952, 953 (8th Cir. 1983)(corporation may not assert rights of individual); Tileston v. Ullman, 318 U.S. 44, 46 (1943)(appeal "must be dismissed" where appellants lack standing).

[70] The Corporations answered on 16 November 1988, and 27 and 28 March 1989. Miller v. Tony and Susan Alamo Fd'n, No. 88-2206 (W.D. Ark.), Docket Nos. 3, 8, 10, *in* Alamo's Cir. Ct. App. at 4. The Millers filed their first affidavit in support of ARCP 4(f) service on 21 June 1989. *Id.*, Docket No. 16, *in* Alamo's Cir. Ct. App. at 4.

[71] Pet. App. at 23a (emphasis supplied). *See* Smith v. Edwards, 279 Ark. 79, 82, 648 S.W.2d 482, 484 (1983). Arkansas' rules of substituted service are mandatory, must be strictly construed, and require exact compliance. *E.g.*, Sims v. Prescott Feed Mills, Inc., 286 Ark. 22, 23, 688 S.W.2d 743, 744 (1985); Edmonson v. Farris, 263 Ark. 505, 508, 565 S.W. 2d 617, 618 (1978). *See also* Galpin v. Page, 85 U.S. (18 Wall.) 350, 368 (1874)(when "constructive service of process by publication is substituted in place of personal citation, * * * every principle of justice exacts a strict and literal compliance with the statutory provisions").

representation). And the issue of such service therefore became moot and nonjusticiable as soon as *Miller I* denoted the Corporations Alamo's *alter egos*.[72] Thus, in either event, *Miller I's* comments on the ARCP 4(f) issue were only *dicta*. These *dicta*, however, could not foreclose the District Court from plumbing the sufficiency of ARCP 4(f) service on Alamo's Rule 60(b)(4) motion. And to the extent that the District Court and *Miller II* relied on these *dicta* to deny that motion, they deprived Alamo of due process of law.

IV. If Arkansas Rule of Civil Procedure 4(f) sanctions service of process by publication under the facts of this case, it violates due process.

Finally, *Miller I* misperceived the key facts on the ARCP 4(f) issue when it wrongly related in *dicta* that "[t]he affidavit required by this Rule * * * recites in great detail the [Millers'] difficulty in locating Alamo and efforts to serve him".[73] And the District Court and *Miller II* rashly relied on this language to deny Alamo an evidentiary hearing on his FRCP 60(b)(4) motion. For, if the Millers' affidavit was sufficient to allow service by publication under ARCP 4(f), then (as applied) that rule deprived Alamo of due process.

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[72] By upholding the District Court's finding on the Corporations' *alter-ego* status and applying the theory of vicarious representation, *Miller I* excluded any rational basis for finding simultaneous ARCP 4(f) jurisdiction, and mooted that issue. *See, e.g.*, Tiedeman v. Chicago, M., St. P. & P.R.R. Co., 513 F.2d 1267, 1273 (8th Cir. 1975) (decision on one issue can moot other issue). At that point, the *Miller I* court lost jurisdiction to "decide" the issue. *Compare* Iron Arrow Honor Society v. Heckler, 464 U.S. 67, 70 (1983), *with* Bishop v. Committee on Professional Ethics and Conduct of the Iowa State Bar Ass'n, 686 F.2d 1278, 1283-84 (8th Cir. 1982).

[73] 924 F.2d at 147.

"[J]udgments *in personam*, obtained *ex parte* against * * * absent parties, upon mere publication of process * * * [can] be the constant instruments of fraud and oppression."[74] That ARCP 4(f) mandates "diligent inquiry" prior to publication of a "warning order" is not enough. Arkansas itself recognizes that, if *true diligence* is not required to ascertain a defendant's "last known address", a "long-arm" statute is unconstitutional.[75] And

> process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. * * *
>
> * * * Where the names and * * * addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.[76]

Here, the record – in which "the facts essential to the exercise of [ARCP 4(f)] jurisdiction must appear", lest "a judgment in the proceeding [be] void"[77] – refutes any notion that the Millers experienced "difficulty in locating Alamo and efforts to serve him"[78] that was the product of something other than their own sloth, and thereby attests that they engaged in no *constitutionally sufficient* inquiry. In a period of almost *eight months*, when they had every reason to believe Alamo was in Saugus, the Millers made

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[74] Pennoyer v. Neff, 95 U.S. 714, 726 (1878).

[75] *See* Halliman v. Stiles, 250 Ark. 249, 255, 464 S.W.2d 573, 577 (1971).

[76] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 316, 318 (1950), *followed in* Schroeder v. City of New York, 371 U.S. 208, 212-13 (1962). A non-party's mere knowledge that court-proceedings are taking place is not enough. New York v. New York, N.H. & H.R.R., 344 U.S. 293, 296-97 (1953).

[77] Davis v. Schimmel, 252 Ark. 1201, 1213, 482 S.W.2d 785, 791-92 (1972). *Accord*, Galpin v. Page, 85 U.S. (18 Wall.) 350, 371 (1874).

[78] 924 F.2d at 147.

but three mailings: twice to the *outdated* address in Alma (28 October 1988 and 26 June 1989), and only once to Saugus (6 June 1989). Also, the Millers clearly did not comply with what must be the constitutional minimum for ARCP 4(f) by mailing to Alma on 26 June 1989, when their mailing of 28 October 1988 to that location had been returned "Not at This Address", and when on 19 June 1989 they received the return of their Saugus mailing of 6 June 1989, indicating Alamo "ha[d] recently been there or w[ould] be returning there".[79]

Moreover, nothing evidences that Alamo ever "evaded" service by refusing to accept mail.[80] Indeed, just the opposite: The first mailing to Alma was returned "Not at This Address", not refused. The second mailing to Alma was returned "Unclaimed" and "postage due", not refused.[81] And the mailing to Saugus was not refused, either, but returned "Not presently at this address", from which the Millers' own attorney concluded "that Mr. Alamo ha[d] recently been there or w[ould] be returning there, and that his whereabouts [were] known to one or more individuals at the * * * Church".[82] No one could

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[79] *See* DiCesare-Engler Productions, Inc. v. Mainman Ltd., 81 F.R.D. 703, 704-05 (W.D. Pa. 1979)("[w]hen put on notice [defendant] had moved * * * [plaintiff] was required to make at least a minimal effort to obtain his new address").

[80] *Contrast, e.g.*, Nikwei v. Ross School of Aviation, Inc., 822 F.2d 939, 941-43 (10th Cir. 1987).

[81] *See* Meeks v. Stevens, 301 Ark. 464, 785 S.W.2d 18 (1990) (return of certified mail "unclaimed" does not constitute refusal or create a presumption of refusal); Recreational Properties, Inc. v. Southwest Mortgage Service Corp., 804 F.2d 311, 314-15 (5th Cir. 1986)("no requirement that the addressee pay for postage prior to receiving [mail]", and "did not have to accept the envelopes").

[82] Significant is that a litigant in another case was able to serve Alamo at the Saugus church during April, 1989, and that the Millers never used the Saugus address as the starting-point for a search. *See* Smith v. Edwards, 279 Ark. 79, 82, 648 S.W.2d

"infer[] evasion on the part of [Alamo] because of the[se] repeated, *though faulty*, attempts at service" by the Millers.[83]

In short, if the Millers' attempts at service were no "mere gesture", nothing would be. And if such a "mere gesture" is "diligent inquiry" under ARCP 4(f), then application of that rule deprived Alamo of due process.

V. The lower courts' refusal to investigate the ownership of Alamo's personal and business records deprived him of due process.

Finally, the lower courts' treatment of Alamo's motion as to the records further exemplifies their disdain for the rudiments of due process. The records were not sold as personalty to the Millers on execution of the judgment against Alamo. Rather, the Millers contended that Alamo had abandoned the records on certain real property they purchased pursuant to the judgment. But that contention raised a complex *factual* issue of Alamo's intent under Arkansas common law which the District Court refused even to investigate.

Instead, the District Court (affirmed in *Miller II*) glibly denied Alamo's motion on the ground that he "failed to cite any legal authority for his request".[84] Alamo, however, knows of no authority holding that an individual irretrievably loses his right to attempt to prove ownership of personal records and business records of corporations declared to be his *alter egos* simply because he has had a default judgment entered against him for damages, and notwithstanding that execution on that judgment has *not* involved any purported sale of the records. To the contrary: the entire *corpus* of due-process jurisprudence

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482, 484 (1983)(treating similar facts as evidence that party "did not make a diligent search").

[83] Mid-Continent Wood Products, Inc. v. Harris, 936 F.2d 297, 303 (7th Cir. 1991)(emphasis in the original).

[84] Pet. App. at 10a.

affirms that an individual may not be finally deprived of property until he has had a *meaningful* hearing on his claim.

CONCLUSION

As applied to Alamo, *Miller I* is a judicial travesty. The Circuit Court treated Alamo as having *personally* been found to be the Corporations' *alter ego* – although *he* was *never* served, did *not* appear in the District Court, *never* litigated the *alter-ego* issue, and did *not* appeal. The Circuit Court ruled that Alamo *did* appear in the District Court through the *alter-ego* Corporations – although the latter court had entered a *default* judgment against him for *failing* to appear (which **non-default default judgment** the Circuit Court implicitly condoned). And the Circuit Court concluded that the *alter-ego* Corporations had standing to raise (and lose) the issue of ARCP 4(f) service – although, if Alamo had appeared in the District Court through them (as the Circuit Court said he had) he could not possibly have been subject to service by publication at all.

Worse yet, *Miller II* is a judicial dereliction. For, confronted with an unanswerable critique of *Miller I's* outrageous deficiencies in due process in the light of *Zenith Radio* and *Hovey*, the Circuit Court simply looked the other way in an unpublished opinion that avoids even acknowledging the issues, let alone addressing the merits – thus leaving the deprivations of Alamo's due-process rights not only unrectified but also unscrutinized. The court also left unscrutinized the issue of ownership of key records Alamo needs to defend himself in on-going litigation – thus setting the stage for further deprivations of due process.

And most serious of all, unless reversed, *Miller I* and *Miller II* will provide the most perverse of precedents in the important provinces of *alter-ego* jurisprudence, default judgments, and due process, potentially perverting a plenitude of future cases.

For these compelling reasons, this Court should grant Alamo's petition and issue a writ of certiorari.

Respectfully submitted,

EDWIN VIEIRA, JR.
13877 Napa Drive
Manassas, Virginia 22111
(703) 791-6780

Counsel of Record for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-1447WA
No. 92-2205WA

Robert A. Miller; Kody Miller, by Robert A. Miller; Robert Miller, by Robert A. Miller; Carey Miller; Jeremiah Justin Miller, by Carey Miller; Rick Miller; James Miller,	*	
Appellees,	*	Appeals from the United States District Court for the Western District of Arkansas.
v.	*	
Tony Alamo, also known as Tony Fernando, also known as Tony Fernando Alamo, also known as Bernie Lazar, also known as Bernie Hoffman, also known as Bernie Lazar Hoffman, also known as Boris Lazar, also known as Papa Tony, individually and as officer & director of Tony & Susan Alamo Foundation & Music Square Church,	*	[UNPUBLISHED]
Appellant.	*	

Submitted: November 12, 1992

Filed: November 19, 1992

Before FAGG, BEAM, and HANSEN, Circuit Judges.

PER CURIAM.

Tony Alamo appeals adverse rulings of the district court in these combined cases. Having reviewed the record and the parties' briefs, we conclude the issues raised on appeal do not require further consideration. The district court's rulings are clearly correct. We affirm the district court. *See* 8th Cir. R. 47B.

[2] A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

ROBERT A. MILLER, ET AL. PLAINTIFFS

v. Civil No. 88-2206

TONY AND SUSAN ALAMO
FOUNDATION, ET AL. DEFENDANTS

ORDER

On October 21, 1991, Tony Alamo (Alamo) filed a motion to dismiss or set aside the default judgment entered on April 27, 1990, and for return of property sold as a result of that judgment. The afternoon of November 12th, Alamo filed a motion for temporary restraining order (TRO) along with a motion for preliminary injunction. He sought to restrain the U.S. Marshal, the plaintiffs and the buyers of the auctioned property from disposing of, degrading the value of or selling any property obtained as a result of this case until the Court could rule on his motion to set aside and vacate the default judgment. The Court held a telephonic conference the morning of November 14th.

By order filed on November 15th reflecting the rulings announced at the conference, the Court denied the November 12th motion for TRO and noted the parties had stipulated that there would be a merger of the motion for preliminary injunction with a decision on the merits of the motion to set aside. Alamo was directed to file his brief by November 25th on whether the [2] holdings in *Miller v. Tony and Susan Alamo Foundation*, 924 F.2d 143 (8th Cir. 1991) (*Miller*) that the district court had

personal jurisdiction of Alamo and that the corporate entities were his alter egos are dispositive of his motion with replies to Alamo's brief to be filed by December 2nd. The Court stated that once all the briefs were filed a review of the file would be made to determine if a ruling could be made on the record without additional testimony or argument.

On November 22nd, plaintiffs filed a response to the motion for return of property. They argue that if Alamo is correct in his assertion that the property is his, then he is admitting that the Court was correct in findings that the corporations were acting as his "alter egos." They continue that if Alamo is instead arguing that the corporations are distinct and separate entities from him, then he is not the proper party to demand the property's return.

On November 26th, Alamo filed his brief on the Eighth Circuit decision. He argues that the issues presented by his October 21st motion were not litigated in the Eighth Circuit, that this Court is not prohibited from addressing the merits of a Civil Procedure Rule 60(b) motion after an appeal, that he would be denied due process if the prior judgment is considered binding on him since he was a non-party, that there is no privity between himself and the corporate entities, that the doctrine of res judicata does not apply to a direct attack on the judgment, that the corporate entities lacked standing to raise the issue of whether there was [3] jurisdiction over him, and that even if plaintiffs had complied with Arkansas' provision for service by publication, such rule was constitutionally deficient as applied in this case.

He filed his response on November 27th to Plaintiffs' November 12th objection and motion to strike exhibits that were attached to his October 21st motion. He asserts that the exhibits constitute an offer of proof of what evidence would be presented at an evidentiary hearing.

On November 29th, he filed a reply on the motion for return of property that if the default judgment is set aside, then plaintiffs have no legal right to the property regardless of whether he or the corporate entities own the property. That same date, he filed a supplement to his November 26th brief adding the argument that his liability for the damages awarded to plaintiff was not briefed or considered on appeal.

Plaintiffs filed a combined response to the motion to dismiss/motion to set aside and vacate default judgment and their brief regarding the Eighth Circuit decision. The brief first deals with Alamo's argument that the claims against him should be dismissed since he was not served within 120 days and then discusses the service by the warning order. Besides responding to the points raised by Alamo, plaintiffs discuss the preclusive effects of the prior litigation, his failure to meet the burden of proof, and the issues of waiver and estoppel due to Alamo's affirmative misconduct.

[4] Alamo filed a reply on December 5th attaching transcript portions of the detention hearings held in Alamo's criminal case. That same date, plaintiffs filed an opposition to Alamo's November 29th supplemental brief on both timeliness and substantive grounds.

On December 6th, plaintiffs filed a reply on the motion for return of property. Their surreply on the

motion to vacate was filed on December 12th attacking the admissibility of the exhibits to Alamo's December 5th pleading.

The Court has carefully examined the arguments of Alamo and plaintiffs in the context of the record including the *Miller* opinion and the applicable law. The Court has concluded that neither an evidentiary hearing nor further argument is required. It is not necessary to get bogged down in addressing all the fallacies of Alamo's arguments since plaintiffs have fully done so. The bottom line is that the Eighth Circuit in *Miller* has already decided that the district court had personal jurisdiction over Alamo pursuant to Arkansas Civil Procedure Rule 4(f) and that, in any case, the entry of appearance of the corporate entities, which have been found to be alter egos of Alamo, constituted an entry of appearance by Alamo. Alamo has simply not shown any basis for the Court to ignore and relitigate those factual and legal determinations. He is not entitled to another bite at the apple under the guise of imaginative, post-appeal variations that ultimately still challenge personal jurisdiction.

[5] On December 6th, plaintiffs filed a motion to strike the appearance of the corporate entities through Roy Gean, III. They ask that all parties be relieved from serving anyone purporting to represent Music Square Church, Inc. and/or Tony and Susan Alamo Foundation since those entities have no existence separate from Alamo. In particular, plaintiffs are concerned that the reappearance of Gean in the certificates of service might be used by Alamo as a waiver by plaintiffs or demonstrating inconsistent action by the Court. Attached as an exhibit is Gean's February 25, 1991 letter explaining why

he would no longer be participating in the proceedings. No response to this motion has been filed. Besides the points made in plaintiffs' motion, the Court notes that Gean did not participate in the November 14th telephonic conference. Plaintiffs' arguments and concerns are well taken and the motion to strike the appearance of the previously dismissed corporate defendants will be granted.

Finally, it appears that there is an outstanding motion filed by plaintiffs on August 1st for attorney's fees and costs under the Equal Access to Justice Act (EAJA) against the United States. This motion is referred to U. S. Magistrate Judge Stites for recommended disposition.

Accordingly, Alamo's October 21st motion to dismiss or, in the alternative, to set aside and vacate default judgment and for return of property is denied. As Alamo's motion for preliminary injunction was merged with the merits of the October 21st motion, the November 12th motion for preliminary injunction is denied. **[6]** Since the exhibits do not affect the Court's ruling, plaintiffs' November 12th motion to strike exhibits is denied. Plaintiffs' December 6th motion to strike the appearance of the previously dismissed corporate defendants is granted. Plaintiffs' August 1st motion for attorney's fees and costs under EAJA against the United States is referred to Magistrate Judge Stites for recommended disposition. Unless the parties notify the Court in writing within 15 days from the file-date of this order of any outstanding motion not addressed by this order, such motion will be deemed moot.

IT IS SO ORDERED this 11 day of February, 1992.

/s/ George Howard, Jr.
UNITED STATES
DISTRICT JUDGE

U. S. DISTRICT COURT
WESTERN DIST.
ARKANSAS
FILED
FEB 12 1992

CHRIS R. JOHNSON, Clerk
By
Deputy Clerk

This document entered on docket in compliance with Rule 58 and 79(a), FRCP, on 2-12-92 by MSJ

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

ROBERT A. MILLER, ET AL. PLAINTIFFS

v. Civil No. 88-2206

TONY AND SUSAN ALAMO
FOUNDATION, ET AL. DEFENDANTS

ORDER

(Filed April 27, 1992)

On February 18th, Alamo filed a motion for determination of ownership and the release of records seized by the U.S. Marshal Service during the execution of the money judgment in favor of the plaintiffs. This motion is supported by exhibits. Plaintiffs responded on February 25th and also moved for imposition of sanctions. Alamo filed a reply to his motion that also responded to the request for sanctions on February 28th. Plaintiffs filed a reply to their sanctions motion on March 5th. Alamo filed a supplemental response on sanctions on March 13th and plaintiffs filed a sur-reply on April 2nd.

On October 17th, a motion for order to release records so they could be used in another case was filed at Alamo's request. After the matter was referred to Magistrate Judge Stites for disposition, the motion was denied by order filed on October 21st on the ground that no legal authority for the unusual request had been presented. Plaintiffs argue that in light of the October [2] 21st decision, Alamo should be assessed sanctions for trying to relitigate this issue.

The records at issue were left on properties that were executed upon in February of 1991 and later sold to plaintiffs at execution sale in this case. Alamo has once again failed to cite any legal authority for his request. The motion for determination of ownership of records and for order of release is denied. However, the Court is persuaded that sanctions are not warranted and so plaintiffs' motion for imposition of sanctions will be denied.

Finally, plaintiffs filed a third petition for allowance of attorney's fees and costs on February 26th. No response to this petition has been filed. This petition is referred to Magistrate Judge Stites for recommended disposition.

Alamo's February 18th motion for determination of ownership of records and for order for release and plaintiffs' February 25th motion for imposition of sanctions are denied. Plaintiffs' February 26th third petition for allowance of attorney's fees and costs is referred to Magistrate Judge Stites for recommended disposition.

IT IS SO ORDERED this 24 day of April, 1992.

This document entered on docket in compliance with Rule 58 and 79(a), FRCP, on 4-27-92 by MSJ

/s/ George Howard, Jr.
UNITED STATES
DISTRICT JUDGE

Robert A. MILLER; Kody Miller by Robert A. Miller; Robert Miller by Robert A. Miller; Carey Miller; Jeremiah Justin Miller by Carey Miller; Rick Miller; James Miller; Claudia Greiner; Ave Maria Askey; Nanette Miller, Appellees.

v.

TONY AND SUSAN ALAMO FOUNDATION, Appellant,

t/d/b/a Southwest Business Management Co., Tony and Susan Alamo Christian Foundation, Holy Alamo Christian Church, Alamo Builders Emporium of Alma, Ark., Alamo Candy Company, Alamo Construction Company, Alamo Electric of Alma, Ark., Alamo Expert Roofing of Fort Smith Ark., Alamo Land Development Company of Alma, Ark., Alamo Plumbing of Alma, Ark., Tennessee Country Boy Distributors & TCB Distributors;

Music Square Church, Appellant.

t/d/b/a Alamo Mini Mart, Holiness Tabernacle Christian School, Alamo of Nashville in Alma, Alamo Ready Mix, Alamo Discount Grocery, Hartford Advertising, Alamo Freight, Alamo Farms, Alamo Restaurant, Alamo Kerr-McGee Transmission Shop, Alamo DX, & End Times Books; Tony Alamo, a/k/a/ Tony Fernandoi,a/k/a Tony Fernando Alamo, a/k/a/ Bernie Lazar, a/k/a Bernie Hoffman, a/k/a Bernie Lazar Hoffman, a/k/a Boris Lazar, a/k/a Papa Tony, ind. & as officer & dir. of Tony & Susan Alamo Foundation & Music Square church; Marc Lundgarten, ind. & managing agent for Tony & Susan Alamo Foundation & Music Square Church; Tommy Scarcello, ind. & managing agent for Tony & Susan Alamo Foundation & Music Square Church; Carol Ann Miller, a/k/a Carol Ann [144] Landgarten, ind. & managing agent for Tony & Susan Alamo Foundation & Music Square Church; Susan L. Miller a/k/a Susan Scarcello, ind. & managing agent for Tony & Susan Alamo Foundation & Music Square Church.

No. 90-1826.

United States Court of Appeals,
Eighth Circuit.

Submitted Dec. 10, 1990.

Decided Jan. 23, 1991.

Plaintiffs brought suit against four individuals and two alleged corporate entities, alleging violations of the Fair Labor Standards Act, the Davis-Bacon Act, and the Arkansas minimum wage law. Other counts alleged various common-law torts perpetrated against defendants. The United States District Court for the Western District of Arkansas, Morris Sheppard Arnold, J., ruled that corporate entities were alter egos of individual defendant, and entered personal judgment against individual defendant in the amount of $1,448,549. Corporate entities appealed. The Court of Appeals, Henry Woods, District Judge, sitting by designation, held that: (1) district court did not err in disallowing testimony of defense witnesses; (2) court properly denied motion for recusal; (3) court had personal jurisdiction over defendant under the Arkansas Long Arm Act; and (4) evidence supported finding that alleged corporate entities were alter egos of individual defendant.

Affirmed.

See also 748 F.Supp. 695.

* * *

[145]

* * *

Roy Gean, Fort Smith, Ark., for appellant.

Peter Georgiades, Pittsburgh, Pa., for appellees.

Before BEAM, Circuit Judge, BRIGHT, Senior Circuit Judge, and WOODS,* District Judge.

HENRY WOODS, District Judge.

The Plaintiffs, Robert A. Miller, et al., filed this suit in the Western District of Arkansas against Tony Alamo, three other individual associates, and two alleged corporate entities, the Tony and Susan Alamo Foundation (hereafter "Foundation") and Music Square Church Inc. The first two counts of the complaint were based on the Fair Labor Standards Act, 29 U.S.C. § 206, et seq. and the Davis-Bacon Act, 40 U.S.C. § 276a, et seq. Count III of the complaint was based on the Arkansas minimum wage law, and the remaining counts alleged various common-law torts perpetrated against the plaintiffs. In an amended complaint the plaintiffs alleged diversity of citizenship. It was also alleged that the corporate entities were vehicles through which Tony Alamo perpetrated fraud (App. 8, 24), that the corporations were totally controlled by Tony Alamo and used for his personal benefit, and that this control and domination was so complete that the corporate entities had no independent personality or existence of their own (App. 12, 40).

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* The HONORABLE HENRY WOODS, United States District Judge for the Eastern District of Arkansas, sitting by designation.

The Foundation and Music Square Church, Inc. answered through joint counsel. None of the individual defendants answered although all were served in accordance with the applicable statute and Federal and State Rules of Civil Procedure. Since none of the individuals filed an answer, a default was entered against each of the individual defendants on August 17, 1989. No action has been taken regarding the default, and no appeal has been perfected therefrom. The issues with respect to the independent existence of the Foundation and Music Square Church, Inc., apart from Tony Alamo, were set for trial on March 5, 1990. After a two-day trial to the court, during which nine witnesses appeared for the plaintiffs and none for the defendants, as a result of the imposition of sanctions, the district court[1] made findings from the bench. They may be summarized as follows:

1. There was "abundant evidence" that the corporate defendants enjoyed no existence separate and apart from Tony Alamo.

2. There was no evidence that the Foundation was ever even incorporated, but even if it was, the Foundation was formed solely for the purpose of shielding Mr. Alamo's activities and/or was operating simply as an extension of Mr. Alamo.

3. The corporations were shams, used by Tony Alamo for his own purposes.

4. Tony Alamo moved corporate assets into and out of the corporations, and between them,

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[1] The HONORABLE MORRIS S. ARNOLD, United States District Judge for the Western District of Arkansas.

at will, and without regard to any ownership interest by the corporate entities.

5. Tony Alamo appointed and removed corporate officers at his personal whim.

6. Tony Alamo held out to the public that there was no distinction between himself and the corporations.

7. Corporate books and records were manufactured and destroyed, in a fraudulent manner, solely on the command of Tony Alamo.

[146] 8. Corporate officers and boards, and the corporate form in general, were ignored by Tony Alamo.

9. The corporate defendants were simply extensions, or "alter egos," of Tony Alamo.

The district court entered its order and judgment on April 19, 1990, providing *inter alia:*

> [D]efendants Tony and Susan Alamo Foundation and Music Square Church, Inc., were entities which enjoyed no existence separate and apart from defendant Tony Alamo, and that the corporate forms of these two organizations should be set aside. That being the case, there is nothing further to adjudicate with respect to these corporate defendants, and they should be dismissed as independent parties to this litigation.
>
> . . . .
>
> . . . Any judgment which may in the future be entered in favor of the plaintiffs in this case and against defendant Tony Alamo as an individual will lie against the entities known as the Tony

> and Susan Alamo Foundation and Music Square Church, Inc. as well.

(App. 191-192). The Foundation and Music Square Church, Inc. appealed from this judgment, raising four points: (1) The district court erred in disallowing the testimony of certain defense witnesses; (2) the district judge should have recused; (3) the district court did not have personal jurisdiction over Tony Alamo; and (4) the court erred in finding that the Foundation and Music Square Church, Inc. were alter egos of the individual defendant Tony Alamo. We affirm.

I. REJECTION OF TESTIMONY FROM DEFENSE WITNESS

Appellants argue that the district judge abused his discretion in sustaining plaintiff-appellee's motion to exclude the testimony of all eight of the witnesses named in defendants' "Pre-Trial Information Sheet." The bases of appellee's motion were: (1) that the defendants should not be permitted to use witnesses who were first identified two business days before trial; and (2) that those witnesses who had been previously identified by name should be excluded because the defendants had failed to disclose their addresses, despite two prior orders of the court compelling them to do so.

In granting the motion, the court made the following findings:

> 1. The defendants had ignored orders of the Court requiring that they provide the addresses of prospective witnesses. (App. 217-18).

2. The defendants had willfully disobeyed the Court's orders for the purpose of causing delay and confusing the plaintiff's case preparation, and had "committed themselves to a course of obstruction." (App. 223-24).

3. By their conduct in disobeying the Court's orders and attempting to confuse the case, the defendants had displayed contempt for the Court. (App. 224:1-2).

4. The defendants' transgressions had been repeated, and had consumed too much of the Court's time. (App. 224).

These findings are fully supported by the record, which is replete with instances of evasion, obstruction, and contumacy by the appellants. We find no abuse of discretion in granting appellee's motion.

II. RECUSAL OF THE DISTRICT JUDGE

Two days before the trial, appellants made a "Motion to Disqualify Presiding Judge" because "his prejudice in favor of the plaintiffs precludes the defendants from obtaining a fair and impartial trial." The only evidence presented in support of the motion consisted of two newspaper articles concerning a court proceeding. The motion was denied because it came too late and the two newspaper articles were inaccurate. There are two statutes dealing with judicial recusal – 28 U.S.C. § 455(b)(1) and 28 U.S.C. § 144. Section 455 has been interpreted to require a party to make its motion and facts known at the earliest possible time. *United States v. Kelly,* 519 F.Supp. 1029 (D.Mass.1981); *Bradley v. Milliken,* 426 F.Supp. 929 (E.D.Mich.1977); *In Re Bokum Resources Corp.,* 26 B.R. 615

(Bkrtcy.D.N.Mex.1982). Clearly, the [147] matter was known to the defendants when the newspaper articles, which constituted the entire basis for the defendants' motion, were published, which was in November, 1989. This delay was totally unexplained.

Section 144 requires that an affidavit be filed ten days before the beginning of the term. No affidavit was filed here. The newspaper articles, which were rank hearsay and demonstrably inaccurate, did not constitute a basis for recusal. The district judge properly denied the motion.

III. VALIDITY OF PERSONAL JUDGMENT AGAINST TONY ALAMO

Appellants argue that no personal judgment could be rendered against Tony Alamo. After the default was entered, the district judge took testimony on damages and entered a personal judgment against Tony Alamo in favor of the plaintiffs in the total amount of $1,448,549. *See Miller v. Tony and Susan Alamo Foundation*, 748 F.Supp. 695 (W.D.Ark.1990). No appeal has been perfected from this judgment. Appellants' attorney does not represent Alamo.

It may be noted in passing that service on Alamo, a fugitive from justice whose whereabouts are unknown, was strictly in accordance with Ark.R.Civ.P. Rule 4(f) The rule reads:

> Where it appears by the affidavit of a party or his attorney that, after diligent inquiry, the identity or whereabouts of a defendant remains unknown, service shall be by warning order

> issued by the clerk and published weekly for two consecutive weeks in a newspaper having general circulation in a county wherein the action is filed and by mailing a copy of the complaint and warning order to such defendant at his last known address, if any, by any form of mail with delivery restricted to the addressee or the agent of the addressee. This subsection shall not apply to actions against unknown tort-feasors.

The affidavit required by this Rule, which recites in great detail the difficulty in locating Alamo and efforts to serve him, was duly filed. (App.289-306). The summons and complaint were duly mailed. (App. 306-322). The warning order was issued by the Clerk and duly published. Service was properly perfected upon Alamo, according to the Federal Rules of Civil Procedure and the Arkansas Rules of Civil Procedure. Rule 4(c)(2)(C)(i) Fed.R.Civ.P. permits service to be made "pursuant to the law of the state in which the district court is held."

Once service was properly made, personal jurisdiction was obtained against Alamo under the Uniform Long Arm Act, A.C.A. § 16-4-101, *Et seq.* (1987). This Act permits personal jurisdiction over one who has "committed a tortious act within the state." A.C.A. § 16-4-101(C)(1)(c) (1987). Here the principal portion of the damages assessed by the district judge resulted from a vicious beating administered by Alamo to two of the child plaintiffs in the presence of a large congregation of his cult followers. Another component of the damage award was the tort of alienation of affections. The Uniform Long Arm Act, after setting forth various methods of obtaining service, states: "This section does not repeal

or modify any other law of this state permitting another procedure for service." A.C.A. § 16-4-102(E) (1987). *Horne v. Savers Federal Savings & Loan Association*, 295 Ark. 182, 747 S.W.2d 580 (1988) addressed precisely the issue now before us. In that case jurisdiction was also asserted under the Uniform Long Arm Act, *supra*. Service was first attempted under Rule 4(e) of the Ark.R.Civ.P. which incorporates A.C.A. § 16-4-102(A)(1) (1987). After making every attempt to serve the defendant, just as appellees did in the instant case, the plaintiff in *Horne* was relegated to the provisions of Rule 4(f). The service was upheld along with *in personam* jurisdiction:

> Appellants next challenge the chancellor's decision that appellee's service of process under ARCP Rule 4(f) was legally sufficient to give the Arkansas court in personam jurisdiction over them. Again, the appellants are wrong. . . .
>
> . . . .
>
> **[148]** Under the circumstances demonstrated here, appellee was denied in its efforts to give appellants actual or personal service provided for out-of-state persons under the methods set forth under Ark.Code Ann. § 16-4-102(1) (1987) and ARCP Rule (e). As a consequence, appellee was relegated to obtain service of process on appellants under Rule 4(f), which is another effective procedure for service under § 16-4-102, Arkansas's long-arm law. *See* Ark.Code Ann. § 16-4-102(E), (which provides this section does not repeal or modify any other law of this state permitting another procedure for service).

747 S.W.2d at 582-83.

This case is dispositive of appellants' argument that there was no *in personam* jurisdiction over Tony Alamo under A.C.A. §§ 16-4-101 and 102 and Rule 4(f). The Supreme Court of Arkansas specifically rejected the same arguments that appellant has made with regard to the applicability of A.C.A. § 16-58-119, holding that Rule 4(f) applied and not this particular statute. As also provided in the Uniform Long Arm Act, domicile is a basis for personal jurisdiction. A.C.A. § 16-4-101(B). Such a jurisdictional basis is constitutional. *Harrison v. Matthews*, 235 Ark. 915, 362 S.W.2d 704 (1962). Undoubtedly Alamo was a domiciliary at the time the cause of action arose.

There is another basis for personal jurisdiction over Alamo. The Foundation and the Music Square Church have appeared in this litigation. These entities were found to be alter egos of Tony Alamo. Thus, the entry of appearance by these entities constituted an entry of appearance by Tony Alamo.

IV. SUFFICIENCY OF EVIDENCE TO ESTABLISH THAT ALAMO WAS AN ALTER EGO OF THE ALLEGED CORPORATIONS

Appellants argue that the evidence was insufficient to establish that the two alleged corporate entities were the alter egos of Tony Alamo. The district court's findings on the issue have been set out, *supra*. Appellants have utterly failed to sustain the burden that these findings were clearly erroneous. *Anderson v. Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). Their approach is to attack the credibility of the witnesses as "disgruntled former associates of the corporate defendants." At least

two of the witnesses were not associates of Alamo. One was a reporter for the *Los Angeles Times*. At any rate, the credibility of these witnesses was a matter within the province of the district judge. We find that each of the court's findings was sustained by abundant evidence. The testimony of the witnesses stands unrebutted in the record.

We affirm the judgment of the district court.

United States Constitution,
Fifth Amendment

No person shall be * * * deprived of life, liberty, or property, without due process of law * * * .

United States Constitution,
Fourteenth Amendment

* * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * * .

Arkansas Rule of
Civil Procedure 4 (f)

(f) **Service Upon Defendant Whose Identity or Whereabouts is Unknown:** (1) Where it appears by the affidavit of a party or his attorney that, after diligent inquiry, the identity or whereabouts of a defendant remains unknown, service shall be by warning order issued by the clerk and published weekly for two consecutive weeks in a newspaper having general circulation in a county wherein the action is filed and by mailing a copy of the complaint and warning order to such defendant at his last known address, if any, by any form of mail with delivery restricted to the addressee or the agent of the addressee. This subsection shall not apply to actions against unknown tort-feasors. (2) In all actions in which the plaintiff has been granted leave to proceed as an indigent without prepayment of costs, where it appears by the affidavit of a party or his attorney that, after diligent inquiry, the whereabouts of a defendant remains unknown, service shall be by warning order issued by the clerk and conspicuously posted for a continuous period

of 30 days at the courthouse or courthouses of the country wherein the action is filed and by mailing by the plaintiff or his attorney of a copy of the complaint and warning order to the defendant at his last known address, if any, by any form of mail with delivery restricted to the addressee or the agent of the addressee.

Federal Rule of Civil Procedure 55

Rule 55. Default.

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

(b) Judgment. Judgment by default may be entered as follows:

* * *

(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor * * * . If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment

by default has been entered, my likewise set it aside in accordance with Rule 60(b).

* * *

Federal Rule of Civil Procedure 60(b)(4)

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: * * * (4) the judgment is void * * * .